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Supreme Court of the United States.

OCTOBER TERM, 1962
No. 445

SOUTHERN CALIFORNIA EDISON COMPANY, a Corporation,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee,

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

Real Parties in Interest.

REPLY TO MOTIONS TO DISMISS APPEAL.

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SOUTHERN CALFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

Real Parties in Interest.

REPLY TO MOTIONS TO DISMISS APPEAL.

It is submitted that the Motions of the adverse parties to dismiss this appeal should be denied, for the grounds advanced in said Motions, and the arguments set forth in the Briefs, supporting said Motions, only serve to emphasize that the pending Appeal presents substantial issues of law and fact, which merit the consideration of your Honorable Court.[1]

[1]The following abbreviations, of parties and certain documents, are sometimes employed herein:

1. Petition for Writ of Review, or, In the Alternative, For A Writ of Mandamus, including exhibits: "Petition"

2. Memorandum of Points and Authorities In Support of Petition For Writ of Review or, In the Alternative, for a Writ

The motions of both of the adverse parties are directed to the importance of the federal questions presented by this Appeal, and also raise certain secondary issues of procedure. Accordingly, we consider each of these matters below, in turn.

Introduction.

We will devote particular attention to the argument of the respondent Commission, which attempts to meet the issue of whether the California statutes,[2] when construed as vesting the state Public Utilities Commission with the power to arbitrarily grant or deny a certificate of "public convenience and necessity" for public utility construction in a contested case, without regard to any evidence, or any standard of reasonableness, are repugnant to the federal constitutional guaranty of due process of law.

At the outset, we wish to call attention to certain inaccuracies in the Commission's Briefs. Thus, it attempts to describe the position of Edison in the pro-

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of Mandamus, including appendices and verification: "Memorandum"

3. Southern California Edison Company, Appellant: "Edison"

4. Statement As To Jurisdiction, filed by Edison in support of this Appeal: "Statement"

5. The Public Utilities Commission of the State of California, Respondent herein. "Commission"

6. Brief filed herein in support of Commission Motion To Dismiss Appeal: "Comm. Br."

7. Southern California Gas Company and Southern Counties Gas Company of California, Real Parties In Interest, herein: "Gas Companies"

8. Brief filed herein in support of Gas Companies Motion To Dismiss Appeal: "Gas Cos. Br."

[2]California Constitution, article VI, sections 1 and 4; article XII, section 22; State of California, Public Utilities Code, sections 310, 1001, 1005, 1705, 1756 and 1760. These constitutional and statutory provisions are set forth in full in Appendix B of the Statement As To Jurisdiction.

ceedings below as only that of "a customer of the natural gas companies" that applied to the California Commission for a certificate of public convenience and necessity. (Comm. Br. p. 6.) The certificate related to construction of the California portion of a pipeline project that was routed near Rock Springs, Wyoming. This project has often been termed the "Rock Springs Project."

As clearly appears from the record, your Appellant had a *dual* position in the proceedings below, both as a *customer* of the Gas Companies, and also as an *applicant* to the Commission for authorization to implement arrangements for the California portion of a pipeline project designed to transport natural gas from Texas, to Appellant's steam-electric generating plants in California. (Petition for Writ of Review, paras. V, VI and VII; St. as to Juris., pp. 3-4.) As originally planned, the project included a pipeline that would traverse northern Mexico, and which would be operated by Petroleos Mexicanos. Accordingly, the plan was sometimes termed the "Pemex" project. The plan has subsequently been substantially modified, and at the present time it is contemplated that the revised plan will involve the construction of a pipeline, from Texas to California, completely within the limits of the United States of America. Essentially, the fuel procurement problem of Edison and its intention to obtain an independent out of state fuel supply remains unchanged. In view of such revisions the application to the state Public Utilities Commission has been withdrawn, subsequent to the filing of the Notice of Appeal herein, but the issues presented by this matter remain unchanged.

The dual position of Appellant was recognized by the Commission, in its Decision below. (See Decision No. 61261, attached to Petition for Writ of Review, as Exhibit C, at pp. 19, 28-29.) It has also been recognized by the Gas Companies, and on page 9 of the Brief filed herein they state that: "For some time past, and certainly before and during the Commission hearings of the instant cause, appellant has been seeking to get for itself by direct procurement a supply of out of state gas to use as boiler fuel."

The Commission contends at page 8 of the Brief that: It has not been asserted that Edison is injured by the *status quo,* as a customer of the real parties in interest, the Gas Companies. To the contrary, the record clearly shows that it is precisely the maintenance of the *status quo* that injures Edison, for the natural gas service provided by the Gas Companies, under "interruptible" schedules, being unstable, and transient in supply, does not adequately provide for the present and future needs of Edison's electric service customers. This vital factual issue, on the need of Edison for an adequate natural gas supply, was squarely presented to the state Commission in the proceeding below, and was recognized, by the Commission, as an issue material to the decision on certification of the "Rock Springs" project. It is the failure, or refusal, of the Commission to disclose its determination of such issue that is a principal cause for this Appeal. (See St. as to Juris., pp. 2-4, 14-18; Petition for Writ of Review, para. XII.)

At stake in this Appeal, as a matter of fact, is not alone the risk that Edison, and its several million electric service customers will be burdened with an increase in rates, resulting from the construction by a natural gas supplier of an economically unsound pipeline. Equally important is the legal right of Edison to a fair consideration of its plans for an independent pipeline project to carry gas from Texas to California, that would ensure an adequate long-range fuel supply, so Edison would be able to continue to provide satisfactory electric service. (St. as to Juris., p. 5.)

It is submitted that the record shows the factual issues arising from the dual position of Edison in this proceeding are in themselves of sufficient national importance, involving not alone the electric service to a major metropolitan area, but also a major interstate pipeline project, to warrant consideration of this appeal.

Moreover, the arguments of the Commission, on the interpretation of the applicable California statutes as vesting it with unlimited authority to grant or deny applications for certificates of public convenience and necessity, further demonstrate that this Appeal presents substantial federal questions as to the validity of such state statutes, when so construed, under the constitutional guaranty of due process of law. These questions, being of vital concern to all parties interested in the regulation of public utilities, in California, and elsewhere, also warrant the consideration of your Honorable Court, upon this appeal.

I.

Statutes Authorizing State Regulatory Agency to Grant or Deny Certificate of Public Convenience or Necessity in Contested Case Without Fair Hearing Are Repugnant to Due Process of Law.

The Commission concedes, in its Brief, that the issue presented to your Honorable Court, for decision, is whether the applicable state statutes[3] are repugnant to the guaranty of due process of law, when they are interpreted as vesting the Commission with the unlimited power to grant or deny a certificate of public convenience and necessity. It argues here, at page 19 of its Brief, as it argued before the State Supreme Court, that under the California Statutes, applications for certificates of public convenience and necessity may be denied, in contested cases, with or without a hearing of the interested parties.[4]

It is submitted that insofar as the state Supreme Court interpreted the applicable statutes to accord with the Commission's argument, such statutes are clearly unconstitutional, for the opportunity to be heard is a fundamental requisite of due process of law. (*Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U. S. 673, 75 L. Ed. 1107, 50 S. Ct. 471 [1930]; *Bratton v. Chandler*, 260 U. S. 110, 43 S. Ct. 43, 67 L. Ed. 157 [1927]; *Granius v. Ordean*, 234 U. S. 385, 394, 58

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[3]Cited in footnote 2, *supra*; and fully set forth in Appendix B of the Statement As To Jurisdiction.

[4]The Commission's argument below, on this point, was described in the Statement at pp. 27-28. It is set forth in the record at pages 27 and 28 of the Answer of respondent Commission to the Petition for Writ of Review etc., filed in the Supreme Court of the State of California.

L. Ed. 1363, 1369; 34 S. Ct. 779 [1913]; *Simon v. Craft*, 182 U. S. 427, 436, 45 L. Ed. 1165, 1170, 21 S. Ct. 836 [1900]; *Louisville and Nashville R. Co. v. Schmidt*, 177 U. S. 230, 236, 44 L. Ed. 747, 750, 20 S. Ct. 630 [1899]).

The requirement of a fair hearing is particularly applicable to the California Public Utilities Commission, which is a special state judicial tribunal. (St. as to Juris. pp. 22-24.) It is settled law that when such administrative body acts judicially, "notice and an opportunity for hearing are indispensable to due process." (*Morgan v. United States*, 298 U. S. 468; 56 S. Ct. 906, 80 L. Ed. 1288 [1936]; *United States v. McCullis*, 200 F. 2d 884, 888 [1st Cir. 1952]; *Magnolia Petroleum Co. v. Carter Oil Co.*, 218 F. 2d 1, 6 [10th Cir. 1954], Cert. den. 349 U. S. 916, 75 S. Ct. 605, 99 L. Ed. 1249 [1955]).[5]

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[5]On other occasions, the California courts have squarely ruled that an application for a certificate, or a license, could not be granted or denied, in a contested case, without a hearing. This rule has not been based on statutory construction, but on the general principles of "the American system of justice", which are expressed in the guaranty of due process of law. (See *Fascination, Inc. v. Hoover*, 39 Cal. 2d 260, 270 (1952); *Carroll v. California Horse Racing Board*, 16 Cal. 2d 164, 168 (1940); *Irvine v. State Board of Equalization*, 40 Cal. App. 2d 280, 284-285 (1940); *State Board of Equalization v. Superior Court*, 5 Cal. App. 2d 374 (1935)). The statutes here involved have also been interpreted by the state Supreme Court, in *Sales v. Railroad Commission*, 15 Cal. 2d 612, 615 (1940), as requiring the respondent Commission to grant interested parties a hearing.

Insofar as the applicable state statutes have been applied in a discriminatory manner, to grant others a hearing, but to deny it to your Appellant, there is a clear violation of the constitutional guaranty of equal protection of the law, and a sound basis for treating these papers as an application for a writ of certiorari. Appellant has prayed your Honorable Court to treat these papers, in the alternative, as an application for such writ, and both the Commission, at page 8, and the Gas Companies, at pages 27 to 30 of their Briefs, concede that in this instance certiorari would be a proper remedy.

A. Due Process Requires That State Regulatory Agency Issue Findings on Material Issues.

We have discussed above the constitutional requirement that a state regulatory agency grant a fair hearing to the parties interested in applications for certificates of public convenience and necessity, because the bold contention that such hearing is not required by the federal constitution, is the cornerstone of respondent Commission's argument. In this instance, the record shows that the respondent Commission did, in fact, conduct a hearing, but then refused or failed to advise the parties of its determination on the material issues litigated and submitted for decision. (Petition for Writ of Review, parás. XII, XIII and XIV; Statement as to Jurisdiction, pp. 14-17, 26.)

As shown in the Statement as to Jurisdiction, at pages 22 to 36, the issuance of such Findings, upon material issues, and jurisdictional facts, is required by the constitutional guaranty of a fair hearing. The argument of the respondent Commission, to the contrary, is essentially a modification of its basic contention that as it has the unlimited power to grant or deny applications for certificates of public convenience and necessity, arbitrarily, the issuance of Findings is immaterial. Inasmuch as it is the settled law that customers of the Gas Companies, such as Edison, are not captive customers and may lawfully obtain their gas supplies from other sources, disclosure by means of findings as to whether or not the Commission certificated the Rock Springs project in reliance upon the Edison load is a requisite to any determination as to whether the certification was contrary to the record and to the constitutional requirements of procedural due process of law.

1. *Recitation of Statutory Phrase "Public Convenience And Necessity" Not A Finding.*

The Commission argues, at pages 9 to 14 of its Brief, that the recitation of a finding on ". . . public convenience and necessity . . .". is sufficient to satisfy the statutory requirements on a hearing, which include the issuance of findings,[6] and also to satisfy the constitutional requirement of due process of law.

Here again, the Commission miscontrues the record, for it concedes, that such Finding must be supported by "substantial evidence", but asserts that: "Appellant makes no contention that the evidence failed to support the grant of the certificate.". (Comm. Br. p. 11.). The record clearly shows that Appellant has specifically contended, at every stage of the proceedings, that: ". . . the evidence in the case does not support the findings." (Petition for Rehearing by Commission, attached to Petition for Writ of Review as Exhibit E, at pp. 1, 7-10; Petition for Writ of Review, para. XIII.)

Of more importance than such misstatement of the record, however, is that a recitation on "public convenience and necessity" is not in itself a finding of fact, for it is settled that such term is a conclusion, without factual content. This is conceded by the Commission, which states that: "There is no set formula or series of issues which make up public convenience and necessity." (Comm. Br. p. 9, citing, *inter alia*, 2 Davis,

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[6]Public Utilities Code sections 310, 1001, 1005, 1701, 1705 and 1757 specifically provide for a hearing and the issuance of findings, by the state Commission, in contested applications for certificates of public convenience and necessity. The text of these sections is set forth in full in Appendix B of the Statement as to Jurisdiction.

Administrative Law Treatise, 16.11, at p. 471, which suggests that ". . . some findings need not be supported by evidence. . . .)"

In short, the Commission does not seriously contend that the recitation on "public convenience and necessity" should be considered a finding of fact, or that the term is sufficiently definite to be supported by evidence, which could be found by citation of the record. The Commission's argument, essentially, is that a Decision in which it recites the statutory phrase "public convenience and necessity", must necessarily be affirmed, for it may grant or deny certificates in its sole discretion; that is, arbitrarily, without regard to any standards of reasonableness, and without regard to the evidence.

The attempt of the Commission at pages 12 to 14 of its Brief, to justify such arbitrary action on the ground that it is authorized by California law, merely emphasizes that the applicable state statutes and constitutional provisions[7] appear to have been applied, in this instance, in a manner repugnant to the guaranty of due process of law. The Commission argument that the decisions of your Honorable Court, which held that recitation of "public convenience and necessity" is not sufficient to support an administrative order, in the absence of supporting findings of fact, are not based on the constitutional guaranty of due process of law, is patently unsound. (We have discussed the leading cases

[7]Cited in footnote 2, *supra*, and fully set forth in Appendix B of the Statement as to Jurisdiction.

on this subject in our Statement as to Jurisdiction, at pages 29 to 36, and will not repeat the discussion here.)

The Commission suggests, at page 14 of its Brief, that it is attempting to support its action on the theory that it is exercising *legislative*, rather than judicial powers. But it is settled law, and is not disputed by the Commission, that while Commission orders in many instances are legislative-administrative in character, as in fixing rates or issuing certificates, the procedure by which the result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon those controverted matters "are strictly judicial." (*Pac. Tel. and Tel. v. Eshleman*, 166 Cal. 630; quoted by Roderick Cassidy, Assistant Chief Counsel for the respondent Commission, in the Foreward to the Public Utilities Code of the State of California, published by the West Publishing Company.) Even the Gas Companies, the real parties in interest to this proceeding, concede that the asserted failure of the Commission to make findings of fact is a ruling "typically of a judicial nature; and is not legislative." (Gas Cos. Br. p. 28.)

Moreover, in the leading decision of *Wichita R. & Light Co. v. Public Util. Comm.*, 260 U. S. 40, 67 L. Ed. 124, 43 S. Ct. 51 (1922), your Honorable Court specifically held, in regard to a state public utilities commission, that when such an agency exercises *legislative* powers, it ". . . must pursue the procedure and rules

enjoined, and show a substantial compliance therewith, to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding of fact, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

That the requirement of findings in *Wichita R. & Light Co.*, was not based on state law, was emphasized by your Honorable Court in *Mahler v. Eby*, 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549, by the statement that the requirement was placed, not only on the language of the state statute, ". . . but also on general principles of constitutional government."

This argument of the Commission merely serves as an admission that it did not issue any Findings, as such, in the proceedings below. We submit, that the state statutes on the power and authority of the Commission,[8] having been interpreted by the state Supreme Court as not requiring Findings on material issues, are clearly invalid, as repugnant to the constitutional guaranty of due process of law.

B. Due Process Requires Findings on Mutual Exclusivity Prior to Rulings on Application for Certificate.

In the Statement as to Jurisdiction, we demonstrated, at pages 36 to 44, that in the Decision that is the subject of this appeal, the state Supreme Court appeared to sanction a statutory procedure which would

[8]Cited in footnote 2 *supra*.

permit the California Public Utilities Commission to prejudge pending applications, without a hearing. In this instance the application of Edison, and others, for authorizations to implement the "Pemex" project, which was designed to transport natural gas from Texas to Edison's steam-electric generating plants in California, was pending before the Commission when it issued the Decisions that are the subject of this Appeal.[9]

It is submitted that neither of the Briefs filed by the adverse parties answer this argument. Neither of the adverse parties assert that such prejudgment of pending applications could be justified, and they concede that such prejudgment would violate the constitutional guaranty of due process of law. They limit their argument to the doctrine of "mutual exclusivity", and are forced in each instance, to misstate the record. Thus, the Gas Companies argue, at pages 17 to 22, of their Brief, that a "comparative hearing" before the Commission was not required, by the facts of this case, and under the procedure followed by Edison.[10]

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[9]As stated above, the project has been modified, since the filing of this notice of appeal.

[10]The additional argument of the Gas Companies, on the timely raising of this issue, is patently unsound. Edison could not determine that the Commission would refuse, or fail to find whether or not the two projects, "Rock Springs" and "Pemex" were mutually exclusive, until the Commission had issued Decision No. 62117, which led to this Appeal. (The Decision is set forth as Appendix A to the Petition For Writ of Review, etc.) The constitutional requirement on Findings was promptly raised, by Edison, in a Petition for Rehearing by the Commission. (Exhibit "E" to Petition for Writ of Review). Upon denial of this Petition for Rehearing, Edison promptly submitted the issue to the state Supreme Court. (Petition for Writ of Review, paras. V, VI, VII,

The Commission, at pages 17 to 21, again misconstrues our argument, and describes it as based on the premise that ". . . the Rock Springs pipeline and that of Pemex are mutually exclusive. . . ."

We submit that the record, and our Statement, show unequivocally that your Appellant has not contended that the two pipeline projects would necessarily be mutually exclusive, and does not assert that a "comparative hearing" of the two projects would necessarily be required. The record shows that Edison has consistently contended, before the state Supreme Court, and on the pending Appeal, that under the "Ashbacker doctrine" the guaranty of due process of law requires a *determination* on the issue of mutual exclusivity, when such issue is raised before a special tribunal or administrative body. (St. as to Juris., pp. 41-44.)

The Commission attempts to argue that the *Ashbacker* rule is based on a federal statute, and is not applicable here, because: "In California a different statutory scheme prevails." (Comm. Br. p. 19.) This argument is merely a variation of the basic contention that under the California Statutes[11] the Commission is not required to grant parties interested in certificate applications a fair hearing, nor to issue findings on material issues. Your Honorable Court stated specifically in *Ashbacker, supra,* that determination of the issue of mutual exclusivity is a rule of substance, and squarely stated: "Legal theory is one thing, but the practicalities are different."

XI, XII, XIII and XIV). The additional federal claim thus made was timely, since it was raised at the first opportunity. (*Cf. Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U. S. 672, 678, 74 L. Ed. 1107, 1112, 50 S. Ct. 471 [1930]).

[11]Cited in footnote 2, *supra.*

II.

Due Process of Law Requires Independent Judicial Review of Orders Confiscating Property Rights.

The record shows the important property rights of Edison, as a customer of the Gas Company and also as an applicant for an independent pipeline project, which are involved in this proceeding. (Petition for Writ of Review, paras. XIII and XIV; Statement, pp. 2-3.) As demonstrated in the Statement as to Jurisdiction, at pages 44 to 47, it is settled law, that state statutes which do not provide for an independent review, by a state court, of orders of a regulatory commission or special tribunal, which confiscate property rights, are invalid, under the due process clause of the Fourteenth Amendment.

The adverse parties, in their Briefs, do not contest this settled principle, nor answer Edison's argument. The Commission inaccurately asserts that we "infer" the state Supreme Court did not review the Commission's decisions, because it denied the Petition for Writ of Review, without opinion. (Comm. Br. p. 21.) This, of course, is not the argument advanced in the Statement as to Jurisdiction. As we there demonstrated, the state Supreme Court did not independently review the Decision of the respondent Commission when it rendered the judgment that is the subject of this Appeal for in the absence of *findings* on the material issues, it would not be possible for any tribunal to conduct an independent review, without consideration of the record, which was not before the state court. (St. as to Juris. pp. 44-47.)

The validity of our argument is demonstrated by the concession of the respondent Commission, at pages

9 to 14 of its Brief, that the Decision under review is supported only by the recitation of a finding on "public convenience and necessity." As shown in our Statement as to Jurisdiction, at pages 44 to 47, insofar as the applicable state statutes are construed as authorizing the Commission to grant or deny applications for a certificate by the recitation of such a finding, which is admittedly merely a factual conclusion (*Cf.* Comm. Br. pp. 9-12), they do not provide for an independent judicial review. This, indeed, is one of the basic reasons for requiring special tribunals, or administrative bodies, to make known their determinations on litigated issues. As stated in *SEC v. Chenery Corp.*, 318 U. S. 80, 94, 63 S. Ct. 454, 462, 87 L. Ed. 626, 636 (1943), ". . . the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review."

So here, in the absence of findings setting forth the determinations of the Commission on the material issues it is clear that the state Supreme Court could not perform an independent review of the Decision, and that it denied the Petition for Writ of Review on the ground that the state statutes vested the Commission with absolute discretion to grant or deny applications for certificates, in contested cases. As so interpreted, we submit, the state statutes are repugnant to due process of law.

III.

Reply to Secondary Arguments of Adverse Parties.

We have considered above, at some length, the arguments of the respondent Commission, and of the real parties in interest, the Gas Companies, on interpretation of the applicable state statutes on hearings and issuance of findings by the Commission, for the arguments and acts of the Commission on these two matters emphasize its disregard for Edison's substantive rights, and the substantial federal questions that are presented on this Appeal.

We will comment only briefly on the remaining arguments of the adverse parties, which relate essentially to interpretation of the record, and matters of procedure.

A. Argument That Commission Issued Findings on Material Issues in Narrative Form.

Both the Commission and the Gas Companies contend that although not required to do so by law, the Commission nonetheless did in fact issue findings in the proceedings below, and that such findings are set forth in narrative form in the three Commission opinions, when these are read together. (Comm. Br. pp. 14-16; Gas Co. Br. pp. 12-16.)

As the three opinions in question are before your Honorable Court as Appendices A, B and C to the Petition For Writ of Review, there can be no factual question as to the presence, or absence, of the required findings. That the Commission failed or refused to

make such findings was clearly shown in our Statement as to Jurisdiction, at pages 14 to 20, 26, and 34-35. As the argument of the adverse parties does not overcome the analysis there set forth, we refer to the Statement, which we submit has not been refuted.

B. Standing to Appeal and Ripeness for Decision.

The argument of the Commission, on pages 6 to 8 of its brief, on Standing, is based essentially on a distortion or misunderstanding of the record. The Commission cites the Statement as to Jurisdiction to support its characterization of Edison's position in the proceeding below as that of a customer of the real parties in interest, the Gas Companies. But as shown at the beginning of this Reply, in the Statement As To Jurisdiction, we clearly cited the uncontroverted portions of the Record which show that Edison occupied a *dual* position in the proceedings below, both as a customer of the real parties in interest, the Gas Companies; and also as an applicant to the Commission for authorization to implement arrangements for an independent interstate pipeline project. (See Petition for Writ of Review, etc., paras. V, VI and VII.)

The argument of the Commission is not applicable to the facts of this case, for Edison's position here is comparable to that considered by your Honorable Court in *Frost v. Corporation Commission,* 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483, where the contention as to Standing was resolved in favor of the Appellant. Here, as in *Frost,* the application of the state statutes

by the regulatory Commission and the state Supreme Court has directly affected the property and property rights of the appellant, in this instance, Edison. The standing of Edison to raise the issue of the validity of such state statutes on appeal to this Court is clearly within the rule set down by your Honorable Court in the leading decisions of *Allied Stores Inc. v. Bowers*, 358 U. S. 522, 3 L. Ed. 2d 1, 79 S. Ct. 437 (1959); and *Pierce v. Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925); that a party whose legal right has been invaded by unwarranted state action has the standing to challenge such action as being repugnant to the protection guaranteed by the federal Constitution.

The Commission's argument on Standing also appears to embrace, inferentially, the question of "ripeness", for on page 8 of its Brief it asserts that for Edison to profess injury is at best anticipatory. The references of the Commission to the pending litigation on the validity of the merger between the El Paso Natural Gas Company and the Pacific Northwest Pipeline Company, suppliers of natural gas to the Rock Springs Project, and to proceedings before the Federal Power Commission, further illustrate, as set forth in the Statement as to Jurisdiction, the important relationship of this case to other proceedings, and the vital issues of fact presented by this Appeal. (St. as to Juris. pp. 47-50.)

As shown in the Statement As To Jurisdiction, the decision of the California Supreme Court, without opinion, is a final judicial determination of the validity of the Order of the California Commission. (Statement, pp. 20 to 21.) This appeal is the proper method of obtaining a review of this adjudication, and if it were dismissed, on the present state of the record, Edison would be deprived of all judicial review of what appears to be a purely arbitrary action on the part of the California Commission, and would suffer the injuries consequent thereon.

It is submitted that Edison not only has "Standing" to prosecute this appeal, but that the matter is now "ripe" for decision by your Honorable Court.

C. State Court Judgment Reviewable by Appeal or Certiorari.

Another subsidiary issue, raised in the Gas Companies motion to dismiss, is that the questions raised by this appeal are only reviewable by certiorari. (Gas. Cos. Br. pp. 27-30.)

This argument is based on the bald, unfounded assertion that this Appeal does not concern the "certification order" of the respondent Commission, but intermediate, procedural rulings. Such argument is an obvious distortion of Edison's position, which is that the certification order is invalid, for as it is not supported by the Findings required by the constitutional guaranty of due process, it was issued without a fair hear-

ing, and was not the subject of an independent review of a state court.

The Gas Companies concede that if the certification order of the Commission is deemed to be a legislative act, and was issued without the findings required by statute, issuance of a writ of certiorari would be proper, under the rule of *Atchison etc. Ry. Co. v. Public Utilities Commission*, 346 U. S. 346, 348, 74 S. Ct. 92, 98 L. Ed. 51. Edison has already recognized that certain elements of this matter might indicate review upon certiorari would be the preferable remedy, and has prayed your Honorable Court, as an alternative to the Appeal procedure, to consider these papers as a petition for such writ. (Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951 Ed.) pp. 43-49; Statement as to Jurisdiction, p. 51.)

The respondent Commission also recognizes the possibility that certiorari may be applicable in this instance, and has requested permission to file a more extensive answer in the event your Honorable Court so treates these papers. (Comm. Br. pp. 2-3.)

It is evident that this matter is within the jurisdiction of your Honorable Court, either upon appeal or upon certiorari, and the Gas Companies motion to dismiss, upon that ground, is poorly founded. Indeed, in the very cases cited by the Gas Companies, your Honorable Court denied the motion to dismiss, and treated the appeal as a petition for writ of certiorari. (*Atchi-*

son etc. Ry. Co. v. Public Utilities Comm., supra; Alabama and Vicksburg Ry. Co. v. Journey, 257 U. S. 111, 42 S. Ct. 6, 66 L. Ed. 254 (1921).)

D. State Court Judgment Did Not Rest Upon Non-Federal Basis.

The Gas Companies also assert, on pages 24-27 of their Brief, and at footnote 14, on page 32, that the state court judgment was, or could have been, based on independent state grounds. Significantly, this assertion is not set forth by the Commission.

It is evident, that the state court judgment was necessarily based upon the federal questions presented in the Petition for Writ of Review, for as the allegations therein were not traversed, nor denied, by Answer or otherwise, they were deemed admitted. (Witkin, Bernard E., California Procedure, vol. 3, pp. 2549 and 2553.) And it is settled that in determining the legal effect of the facts so alleged, as a deprivation of appellant's legal rights under the XIVth Amendment, the Supreme Court of the United States is at as full liberty to consider them as was the state Supreme Court. (*Truax v. Corrigan*, 257 U. S. 312, 324, 42 S. Ct. 124, 66 L. Ed. 254, 259; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951 Ed.), at pp. 204-205; Statement as to Jurisdiction, pp. 17-21.)

IV.

Motion to Correct Title and Caption of Case Should Be Denied.

There is also pending before this court a motion of the Gas Companies, the real parties in interest, to correct the title and caption of the case, so that they would appear as appellees herein. This motion, dated October 12, 1962, is made in part on the ground that the Gas Companies are parties in the cause adverse to your appellant, and are therefore entitled to be treated as, and to have all the rights and privileges of, appellees. It is an evident fact that the Gas Companies and the appellant are, and from the beginning of the certification proceeding have been, adversary to each other. However, as is indicated by the motion and brief filed by the Public Utilities Commission, it is not accurate to state that in California practice the respondent Commission is only a "nominal party". On the contrary, as shown by the motion to dismiss, and the supporting brief filed by the Public Utilities Commission of the State of California, the Commission appears as an actual respondent in this proceeding and vigorously defends its orders and decisions. As the Public Utilities Commission is the proper party respondent in this action, the role of the Gas Companies is accurately and literally described as "real parties in interest".

We have discussed, above, such contentions of the Gas Companies, in their brief in support of the motion to dismiss, as appear relevant. As parties to this proceeding, whether as appellees, or real parties in interest, they may have the right to be heard by your Honorable Court. However, it is submitted that the

proper appellee herein is the Public Utilities Commission and that the title and caption of the case need not be altered.

Conclusion.

It is submitted that the briefs filed by the respondent Commission and the Gas Companies, real parties in interest, emphasize the significance of the questions of fact and law posed by the present appeal, which involves the rights of the several million people that utilize the electric service offered by your appellant, Edison, and a judgment that could establish a precedent on the arbitrary exercise of power by state regulatory agencies. It is clear, from the decisions of the Commission, that the property and property rights of your appellant, Edison, are in jeopardy, and that it has standing to prosecute this appeal. The relationship of this appeal to proceedings before the federal courts, the federal power commission, and the state public utilities commission itself, further emphasize that this matter is now "ripe" for consideration.

The motions to dismiss should be denied.

Dated: December 1, 1962

Respectfully submitted,

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